Supreme Court, U.S.
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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's brief in opposition does nothing more than argue the merits of the case and defend the correctness of the opinion below. Even on its own terms, respondent's argument is flawed. But more important, it is an argument addressed to the merits, not a reason for denying certiorari.

On the issue of certiorari, respondent's brief only confirms the need for review by this Court. Respondent concedes that there is a square conflict between the holding below and those of every other circuit court to consider the question presented – a question of federal statutory construction that is critical to assuring full protection against sex dis-

crimination in education. The Court should grant certiorari and resolve this issue now.

I. RESPONDENT'S BRIEF CONFIRMS THE EXISTENCE OF A CONFLICT IN THE COURTS OF APPEALS ON AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION.

Petitioner's chief argument for certiorari is that the decision below conflicts with those of other courts of appeals. Pet. at 8-10. Respondent does nothing to rebut this contention. Instead, the Board concedes the existence of a conflict and argues only that decisions from other courts of appeals are wrongly decided. Opp. at 10-12. Petitioner, of course, takes a different view of the merits. But for present purposes, the important point is that petitioner and respondent *agree* that the circuits are divided as to whether Title IX's private right of action extends to claims of reprisal discrimination.

Respondent concedes expressly that at least three courts of appeals (the Eleventh, Fifth, and Fourth Circuits) have squarely addressed the issue presented in this case – and reached differing conclusions. Opp. at 10 n.7. By itself, that would be grounds for granting certiorari. But the split is deeper than that. Respondent does not (and could not) dispute that the decisions of two other courts of appeals – the Second Circuit in *Murray v. New York University College of Dentistry*, 57 F.3d 243 (1995), and the First Circuit in *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 67 (2002) – also are in conflict with the decision below. Pet. at 9.

Respondent does argue that *Murray* and *Frazier* are of only "marginal relevance," because they lack "detailed analysis" and ultimately reject retaliation claims on other grounds. Opp. at 10 n.7. Neither of those distinctions has any bearing on whether certiorari is warranted. The crucial issue here is the conflicting legal *standards* applied in different circuits, not the level of detail employed or the outcomes achieved on particular facts. The legal standard that governs in the First and Second Circuits – that a cause of action exists for reprisal discrimination – differs from that established by the Eleventh – and applied to the facts of *this* case, it would lead to a different result.

At bottom, respondent's position on the circuit split identified in the petition is that the cases in conflict with the decision below – and especially the Fourth Circuit's decision in *Peters v. Jenney*, 327 F.3d 307 (2003) – are wrongly decided. Opp. at 10. That is no answer to the argument for certiorari. In fact, for all the reasons discussed in the petition, the analysis in *Peters* and cases like it is entirely correct. Pet. at 11-12. But quite apart from the ultimate merits of the issue, this Court should grant certiorari rather than allow the lower courts to stand in acknowledged disagreement on this important issue of federal law.

II. RESPONDENT'S MERITS ARGUMENTS MISAPPREHEND THE NATURE OF THE QUESTION PRESENTED.

Respondent's merits arguments are not only misplaced but also misconceived in important respects. At various points in its brief, respondent misconstrues both the argument advanced in the petition and the parameters of the question presented. To the extent that this confusion is derived from the mistaken analysis of the court below, it is an additional reason to grant review and clarify the law in this area.

1. Much of respondent's brief is addressed to the wrong question. This is not a case about whether Title IX creates a private right of action, a question definitively resolved by the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Instead, it is a case about the substantive guarantees of Title IX: whether Title IX prohibits retaliation, so that

retaliation claims are encompassed within the cause of action recognized in *Cannon*. Pet. at 2.

Many of respondent's arguments fail to appreciate this critical distinction, and thus fall wide of the mark. Respondent argues, for instance, that the structure of Title IX and the statute's express administrative remedy "militate against an implied private remedy." Opp. at 9. But arguments about the existence of a private right of action under Title IX are foreclosed by *Cannon* and beside the point here. Similarly, respondent's view that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), has been called into question by both *Cort v. Ash*, 422 U.S. 66 (1975), and *Alexander v. Sandoval*, 532 U.S. 275 (2001), Opp. at 12-13, rests on a misunderstanding of the issue presented. *Sullivan* is important here not because it identifies a private cause of action under § 1982; that issue is settled already with respect to Title IX. It is important because the Court construes § 1982's broad anti-discrimination mandate to include a prohibition on retaliation – a holding about the substantive content of § 1982 that is neither undermined by, nor even related to, the Court's later decisions in *Cort v. Ash* and *Sandoval*.

In short, respondent's arguments miss the point. The actual question in this case – as respondent itself recognizes elsewhere in its brief – is whether Title IX prohibits retaliation or whether, as respondent would have it, "retaliation is not prohibited by the statute and is therefore permitted." Opp. at 16.

2. Throughout its brief, respondent asserts that petitioner – as well as the Fourth Circuit in *Peters* – is arguing that a private cause of action arises solely from relevant administrative regulations. *See, e.g.*, Opp. at 4, 11, 12, 14. That is not petitioner's position, and it is not the position adopted in *Peters*.

As explained in the petition, the right of action in question arises not because retaliation is prohibited by a Department of Education regulation, but because it is prohibited by Title IX. Pet. at 10-12. The anti-retaliation regulation is relevant because it sheds light on congressional intent and validly construes Title IX. *Id.* at 10-12, 19-21; *Sandoval*, 532 U.S. at 284 (cause of action for conduct prohibited expressly by statute or by regulations that "authoritatively construe" statute); *cf. Peters*, 327 F.3d at 315, 319 (applying *Sandoval*). But the ultimate question, as noted just above, is whether *Title IX itself* prohibits retaliation. Nothing in petitioner's brief suggests otherwise. It is respondent, not petitioner, that sometimes loses sight of the point.[1]

3. Contrary to respondent's oblique suggestions, Opp. at 6 n.4, 10 n.7, no legal significance attaches to the fact that petitioner in this case is a man who was not the target of what the Eleventh Circuit calls "direct" gender discrimination. Petitioner's status does not distinguish this case from other Title IX cases, nor narrow the scope of the question presented.

As respondent itself appears to understand,[2] the decision below does not rest on the particular facts of the case. The holding of the Eleventh Circuit is that Title IX does not

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[1] Respondent's unconvincing parsing of the anti-retaliation regulation, Opp. at 17-18, for instance, is largely beside the point. Even if it were true that the regulation did not by its terms prohibit retaliation, that would not resolve the issue of whether retaliation is barred by Title IX. In any event, it is difficult to imagine a regulation that more clearly prohibits retaliation than one that begins: "Intimidatory or retaliatory acts prohibited." 34 C.F.R. § 100.7(e).

[2] The first twenty pages of respondent's twenty-one page brief are devoted to defending the Eleventh Circuit's holding that Title IX does not prohibit retaliation against anyone. Only then does the brief note that the Eleventh Circuit "also held" that any cause of action for retaliation would not extend to men like petitioner. Opp. at 20.

"prevent or redress retaliation" at all. App. 22a; Pet. at 6. Only after reaching that conclusion does the court go on to identify petitioner's status as a male coach protesting discrimination against the girls on his high school basketball team as grounds for denying relief even if retaliation were otherwise prohibited. App. 23a.

Nor are we aware of any other reported Title IX retaliation case that turns on whether the claimant had protested discrimination against him or herself as opposed to discrimination against others. That is not surprising. None of the major civil rights statutes that expressly bars retaliation draws any such distinction, either; instead, Congress has protected those who complain of discrimination against others as fully as those who protest discrimination against themselves. *See, e.g.*, 42 U.S.C. § 2000e-3(a)(2000) (Title VII); *Hazel v. U.S. Postmaster Gen.*, 7 F.3d 1, 3 (1st Cir. 1993) (describing broad retaliation provision of Title VII).[3] Congress – like this Court, *see Sullivan*, 396 U.S. at 237; Pet. at 13 – recognizes that statutory equality rights cannot be fully vindicated unless *all* persons who complain of discrimination in violation of a statute are protected against retaliation. There is no reason to think that Congress would have wanted some lesser standard to protect the rights guaranteed by Title IX.

[3] Other examples of civil rights statutes with anti-retaliation provisions, all of which expressly apply to those who complain about discrimination against others, are the Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b) (2000); the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); and the Family and Medical Leave Act, 29 U.S.C. § 2615(a) (2000). The lower courts have also interpreted the anti-retaliation provision of the Fair Labor Standards Act to apply to all who oppose activity in violation of the statute, whether on their own behalf or on behalf of others. *See, e.g.*, *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989).

Indeed, as this case well illustrates, protection of those who protest discrimination against others may be especially critical to enforcement of Title IX rights. Many of the persons protected by Title IX are students and minors, often poorly situated to raise complaints and force compliance with statutory requirements. Adult employees of schools, on the other hand, are far better positioned both to identify potential Title IX violations and to bring them to the attention of school administrators in a way that will result in voluntary compliance. Unless coaches acting on behalf of their student athletes are protected against retaliation, one of the most effective means of Title IX enforcement will be foreclosed.

Thus, the fact that petitioner in this case complained of gender discrimination directed against members of the girls' basketball team rather than gender discrimination directed against himself is of no legal import. The question in this case is simply whether Title IX prohibits retaliation, against petitioner or anyone else.

* * *

Respondent has conceded that the holding of the court below directly conflicts with those of a number of other courts of appeals. Given the great significance of that holding – which undermines the rights of every American protected against discrimination by Title IX – the Court should grant certiorari without delay. This case, in which the issue is cleanly and directly presented, is the perfect opportunity for it to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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